No. 271.

Brf. of Maxwell for P. in Error.

Office Supreme Court U. S.
FILED
FEB 26 1900
JAMES H. McKENNEY,
Clerk.

Filed Feb. 26, 1900.

# Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 271.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
*Plaintiff in Error,*

*vs.*

BENJAMIN F. THIEBAUD, Administrator of Chris Sweetman, Deceased.

**In Error to the Circuit Court of the United States for the Southern District of Ohio.**

## BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

# Supreme Court of the United States,

**OCTOBER TERM, 1899.**

No. 271.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
*Plaintiff in Error,*

*vs.*

BENJAMIN F. THIEBAUD, Administrator of Chris Sweetman, Deceased.

**In Error to the Circuit Court of the United States for the Southern District of Ohio.**

## BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

This was an action for wrongful death commenced in the circuit court by Thiebaud, administrator, against the Railroad Company. After verdict and judgment in favor of the plaintiff, the Railroad Company sued out a writ of error from the circuit court of appeals for the sixth circuit. The case being docketed in that court, Thiebaud moved to dismiss it, upon the ground that the writ should have been taken from this court, and that the circuit court of appeals was therefore without jurisdiction. The Railroad Company resisted the motion, insisting that the record did not show that any question as to the

constitutionality of the statute of Indiana was raised or decided by the circuit court, and citing Ansbro vs. U. S., 159 U. S., 695, to the proposition that an assignment of errors can not be used to import a constitutional question into the cause which the record does not show was raised and decided below, so as to give this court jurisdiction under the fifth section of the act of March 3, 1891; also citing Carey vs. Houston & Texas Central Ry. Co., 150 U. S. 170, 181, and Northern Pacific Railroad Co. vs. Amato, 144 U. S. 465, 472.

The circuit court of appeals, however, was in doubt whether the writ of error should have been sued out from this court, and accordingly, instead of overruling Thiebaud's motion, certified certain questions to this court, which are now docketed here under the title of the Cincinnati, Hamilton & Dayton Railway Company, plaintiff in error, vs. Benjamin F. Thiebaud, Administrator of Chris Sweetman, No. 259, October Term, 1899.

Thereupon the Railroad Company sued out the present writ of error from this court. The ground upon which it did so is stated in its petition for the writ filed in the circuit court (Rec. 17) to wit:

"The defendant shows to the court that, having duly prosecuted the writ of error heretofore allowed by the court to the United States Circuit Court of Appeals for the sixth circuit, the plaintiff in this case, being the defendant in error, filed a motion in said circuit court of appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States instead of to the United States Circuit Court of Appeals, and that said circuit court of appeals was therefore without jurisdiction upon said writ of error.

Said circuit court of appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States Circuit Court of Appeals was properly

allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the circuit court of appeals has jurisdiction thereof, now prays for a writ of error to the Supreme Court of the United States, and assigns for error." [Here follow the assignments of error.]

Judge Taft granted the petition and allowed the writ, as shown by the following order, which he entered in the circuit court (Rec. 18).

"This cause came on to be heard upon the defendant's petition for allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the circuit court of appeals for the sixth circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States circuit court of appeals, said petition is now granted and a writ of error, as prayed, is allowed to the Supreme Court of the United States."

In view of the fact that Thiebaud, administrator, insisted in the circuit court of appeals that the writ of error should have been sued out from this court, and that he induced the circuit court of appeals to certify to this court the question of jurisdiction, which he himself raised, he should be required to await the decision of this court on the hearing of that certificate in case No. 259. He ought not to be permitted to take in this court a position exactly the opposite of what he took in the circuit court of appeals; to say in that court, because it suited his purpose then, that this court alone had jurisdiction, and then, when the case reaches this court, to turn about and say that the circuit court of appeals alone has jurisdiction. It is at least strange for him to suggest to this court, under the circumstances, that the present writ "is taken for delay only."

The following extract from the certificate of the circuit court of appeals, now docketed in this court as case No. 259, October

term, 1899, shows the grounds upon which Thiebaud moved to dismiss the writ in that court.

"Thereupon the defendant in error [erroneously printed plaintiff in error] moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a state is in contravention of the Constitution of the United States, and that, therefore, under Section 5 of the Act of Congress, approved March 3, 1891 (26 Stat., 826), *the writ of error should be taken from the Supreme Court of the United States and not from this court.*

The court is in doubt whether the case is within the provisions of said section of the Act of Congress, and, therefore, upon the foregoing statement of facts, it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:" [Here follows statement of the questions certified.]

Of course if the proceeding in error in the court of appeals was without jurisdiction, as claimed by Thiebaud, its pendency was no bar to suing out a second writ from this court; nor was there any impropriety, under the circumstances, especially in view of the doubt which the circuit court of appeals itself expressed concerning its jurisdiction, in the precautionary course that the Railroad Company pursued, and which Judge Taft approved, in suing out a second writ of error from this court. If the Railroad Company had awaited the determination by this court, in case No. 259, of the question whether the circuit court of appeals had jurisdiction, and that question had been decided adversely, it would then have been too late for the company to sue out a writ of error from this court.

In Pullman Palace Car Co. vs. Central Transportation Co., 39 U. S. App., 307; 76 Fed. 401, the appellant, having taken an appeal to this court, and being in doubt whether this court or the circuit court of appeals had jurisdiction, took a second appeal to the circuit court of appeals. The latter court declined

to dismiss the appeal pending the decision of this court. In this court (171 U. S. 145), Mr. Justice Peckham, referring to the ground upon which the appeal had been taken here, said: "There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the circuit court of appeals. We think that by this action he did not waive any right of appeal which he would have otherwise have had."

We submit that, under the circumstances of this case, the court should postpone the consideration of the present motion to dismiss, until the hearing of the certificate sent up by the circuit court of appeals, which presents the question of jurisdiction, being case No. 259. If Thiebaud has experienced a change of heart and is sincere in his present claim that it is the circuit court of appeals, and not this court, that has jurisdiction, he should dismiss his motion in the circuit court of appeals, and apply for leave there and here to withdraw the certificate which is docketed here as No. 259.

The present motion appears to be an effort to force a submission of the merits of the case on briefs, under the claim that there is color for the motion to dismiss, and that the writ was sued out for delay. But the record does not warrant the latter suggestion. We desire to argue the merits of the case orally, either in this court or in the circuit court of appeals, as the jurisdiction of the one or the other may be finally established. When that opportunity presents itself, we hope to be able to show by recent decisions of the Supreme Court of Indiana, construing the Act of 1893, and by the decisions of the courts of England construing her Employers' Liability Act of 1880, from which the Indiana statute was taken with important modifications, that the conductor and engineer of the freight train, through whose negligence Sweetman was killed, were his fellow servants, and that their common law relation as such is not changed by the statute on which the plaintiff relies for recovery.

We think it is also very clear, under the decisions of the Supreme Court of Indiana, that Thiebaud's appointment as administrator by the circuit court of Fayette county in that state was absolutely null and void. Indeed opposite counsel have apparently taken the same view, because since the judgment below in this case, they have had another administrator of Sweetman's estate appointed in Ohio, in whose name they have commenced an action for his death against the Railroad Company, which is now pending in the court of common pleas of Hamilton county, Ohio.

We hope also to show that the plaintiff, having been appointed administrator in Indiana alone, could not maintain his action in Ohio. The general rule is not denied by our adversaries. They rely solely upon a statute of Ohio passed in 1840, which authorizes foreign administrators to maintain suits in Ohio "in their capacity as administrator." But this statute, passed long before actions for wrongful death were known, relates only to suits to recover "assets" which have devolved upon an administrator as such. It does not cover suits brought by an administrator as a nominal party, for the use and benefit of others, to enforce a cause of action which is not "assets" of the estate, and which does not vest in the administrator "in his capacity of administrator."

There is also grave doubt of the plaintiff's right to maintain an action in a federal court in Ohio, brought nominally and in fact for the use and benefit of persons who are admitted to be citizens of the same state as the defendant.

But we do not propose now to discuss these questions but only to suggest them, in order to repel the insinuation that this writ "is taken for delay only." They are fully presented in our brief on the merits, which was filed in the circuit court of appeals before Thiebaud made his motion to dismiss the proceeding in error in that court for want of jurisdiction. The difficulty he experienced in meeting the case on its merits may ac-

count for his tactics in challenging the jurisdiction, first of the circuit court of appeals, and then of this court, but we surely have a right either in this court or in the court of appeals to have the merits of our writ of error presented and heard in the usual way.

We respectfully ask that the motion to dismiss be postponed until the hearing of No. 259. A litigant who insists in the circuit court of appeals that this court alone has jurisdiction, and induces that court to certify the question, and then in this court insists that it has no jurisdiction, hardly presents a record of good faith entitling him to special consideration.

LAWRENCE MAXWELL, Jr.,
Counsel for the Plaintiff in Error.

IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1899.

*No. 271.*

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF THE ESTATE OF CHRIS. SWEETMAN, DECEASED.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

## BRIEF FOR THE PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE AND ASSIGNMENT OF ERRORS.

Action for wrongful death. Verdict and judgment for the plaintiff. The deceased was a locomotive engineer running an engine drawing the pay-car. He was killed in a collision caused by the negligence of the conductor and engineer of another train (Rec., p. 8). It is well settled that the negligent conductor and engineer were fellow-servants of the deceased, and that the company was not therefore liable for their negligence (New England Railroad Co. *vs.* Conroy, 175 U. S., 323; Baltimore and Ohio Railroad Company *vs.* Baugh, 149 U. S., 368; Northern Pacific Railroad Company *vs.* Hambly, 154 U. S., 349; Northern Pacific Rail-

road Company *vs.* Peterson, 162 U. S., 346; Northern Pacific Railroad Company *vs.* Charless, 162 U. S., 359; Martin *vs.* Atchison, Topeka & Santa Fé Railroad Company, 166 U. S., 399; Northern Pacific Railroad Company *vs.* Poirier, 167 U. S., 48; Alaska Mining Company *vs.* Whelan, 168 U. S., 86; Becker *vs.* B. & O. R. R. Co., 57 Fed., 188, Indiana).

The plaintiff claims, and the circuit court held, that the rule is changed, and that the defendant is made liable by the act of Indiana of March 4, 1893, Rev. Stat., 1894 (Burns), section 7083, which we print as an appendix to this brief.

We claim—

1. That the case is not within the provisions of the act.

2. That the circuit court was without jurisdiction, because the widow and children, for whose benefit the action was brought, were citizens of the same State with the defendant.

3. That the plaintiff's appointment as administrator was void, and that the circuit court erred in holding that the appointment could not be collaterally attacked, and in excluding evidence to show that it was void.

4. That the plaintiff cannot maintain the action in Ohio by virtue of his appointment as administrator in Indiana, even if that appointment be valid.

The following brief was printed for the circuit court of appeals. Upon the construction of the Indiana statute we add the case, since decided, of Hodges *vs.* Standard Wheel Co., 152 Ind., 680, 691, in which it was held that the plaintiff must show that the person whose negligence caused the injury "was a person in the service of appellee, to whose order or direction under the particular circumstances of the case he, as an employé of appellee, was 'bound to conform and did conform.' '*Ita lex scripta est.*' The law is so written and means what it expressly declares."

Also Slocum *vs.* Pomery, 6 Cr., 221, and Garland *vs.* Davis, 4 How., 131, to the proposition that anything which would have been fatal upon a motion in arrest of judgment is fatal upon a writ of error, although objection was not taken in the court below.

## ARGUMENT.

### I.

### The Case is not within the Provisions of the Act of 1893.

It is claimed that it comes within subdivision 4 of Sec. 1;

"Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe, or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The purpose of this provision of the statute was to change the law of fellow-servant, theretofore prevailing in the state, as declared by the decisions of its Supreme Court. But it applies only to persons who are "obeying or conforming to the order of some superior *at the time of such injury*, having authority to direct." This was not Sweetman's case. He was running an engine drawing the pay car. It will not be presumed that he "was obeying or conforming to the order of some superior, at the time of such injury, having authority to direct." There is no such allegation in the petition, nor indeed is any other *fact* alleged to bring the case within the provisions of the statute.

The statute has been construed by the Supreme Court of Indiana in two cases; Baltimore & Ohio S. W. Ry. Co. vs. Little, 149 Indiana, 167; 48 N. E. Rep. 862, and Pittsburgh, C. C. & St. L. Ry. Co. vs. Montgomery, 49 N. E. Rep. 582. The first case was an action by a locomotive engineer to recover damages suffered in a collision caused by the negligence of a head brakeman in failing to close and lock a switch. The court held that

the head brakeman was a fellow-servant of the engineer, not removed from that relation by the act, and that the plaintiff could not recover.

The second case was an action by a freight brakeman injured by the negligence of the engineer in charge of the train. It appeared "that the conductor of said train, acting in the service of appellant, the authority and position of said conductor making it appellee's duty to obey his orders with respect to said train and switching, ordered appellee to go between said cars to make couplings, and while so engaged the engineer in charge of said train, also in appellant's service, and in the line of his duty, without signal, carelessly, negligently and recklessly reversed said engine and applied full steam, whereupon said cars were driven and jammed together with terrific force, without notice to appellee, whereby appellee's entire right hand was caught between the bumpers and mashed off, without any fault on his part" (49 N. E. 584).

The court held that this made a case under the statute, upon the ground that the plaintiff was "obeying the order of some superior at the time of such injury, having authority to direct."

The judges were not agreed as to the meaning of the words "the said person, co-employe or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf," but all the judges agreed that the concluding clause, "the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct," qualifies all that precedes. For the purposes of the case they thus state subdivision 4;

"Where such injury was caused by the negligence of any person in the service of such corporation, who has charge of any * * * locomotive engine upon a railway * * * and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct" (49 N. E. 584).

The statute was evidently based upon the English Employer's Liability Act of 1880, which we print as an appendix. A com-

parison of the corresponding sections of the two statutes (Sec. 1, Subd. 4 Indiana, and Sec. 1, Subd. 5 English) shows the important modification of the English Statute introduced into the Act of Indiana.

It had been "firmly established as the law of Indiana" that "servants engaged in the same general line of duty are fellow-servants, although one may be a superior and the others may be subordinate servants under his immediate direction and control." Such is the statement of the law of that state made by Elliott, J., in Indiana Car Co. vs. Parker, 100 Ind. 181, 185, 186, an action in which it was held that the Car Company was not liable for an injury to a workman in its shop, caused by the foreman's negligence. The judge, citing many cases in that state, and in other courts, said further:

"We concur with counsel in the statement of the general principle, that a foreman is a fellow-servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman, the master is not responsible to a fellow-servant. The overwhelming weight of authority sustains this general doctrine, and our own court has been one among its staunchest supporters, as a long line of decisions attest."

The following are instances of persons held to be fellow-servants by the decisions of the Supreme Court of Indiana prior to the Act of 1893. Section foreman and members of his gang, Justice vs. Pennsylvania Co., 130 Ind. 321, 325; locomotive engineer and engine cleaner working under him, Spencer vs. Ohio & M. Ry. Co., 130 Ind. 181; car inspector and servant employed in loading cars, Neutz vs. Jackson Hill Co., 139 Ind. 411; conductor and train crew engaged under his orders in making a running switch, Sheets vs. Chicago, etc., Ry. Co., 139 Ind. 682; engineer and train hand Evansville, etc., R. R. Co. vs. Henderson, 134 Ind. 636, 641; member of one section gang and boss of another gang, Clarke vs. Pennsylvania Co., 132 Ind. 199.

2. We submit whether the statute applies at all in case of an injury resulting in death, in view of Sec. 3, which declares that "in such case the action shall survive and be governed in all respects by the law now in force as to such actions."

It is a familiar rule that such statutes, being in derogation of the common law, are to be construed strictly. Smith vs. Chicago, M. & St. P. Ry. Co. 91 Wis. 503, and cases cited; P. C. C. & St. L. Ry. Co. vs. Hine, 25 Ohio St., 629, 634.

## II.

### The Statute Contravenes the Fourteenth Amendment, and also the Constitution of Indiana.

It makes corporations liable simply because they are corporations; individuals, joint stock companies and co-partnerships not being liable under the same circumstances. Such a discrimination between corporations and all other persons is not permissible under a system of law which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law." The Constitution of Indiana, under which, as under the Federal Constitution, it is held that a corporation is a citizen within the meaning of the law, declares that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens" (Art. 1, Sec. 23).

Smith vs. Louisville & Nashville Railroad Co. 75 Ala. 449, was an action brought under a statute, which the court held to be unconstitutional, upon the ground that it discriminated between corporations and private associations and other persons, and therefore denied to the former the equal protection of the law. This is the statute:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of per-

sons, for such wrongful act or omission, and may recover such damages as the jury may assess."

Stone, J., said:

"Is the act copied above constitutional? It will be observed that under the statute, the action lies only against certain classes; corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers, and agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law, and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or, if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of the business, and the wrongful act or omission of the agent be, in each case, the same. How this will work, will readily suggest itself. If the employer being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act, by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business, and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?"

The court closes its opinion with the following observation:

"We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion" (p. 452).

In Soon Hing vs. Crowley, 113 U. S. 703, it was held that:

"Municipal restrictions imposed upon one class of persons en-

gaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws."

Mr. Justice Field, delivering the opinion, said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions" (113 U. S. 709).

In Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150, a statute of Texas which singled out railway corporations and made them alone liable for attorneys' fees, for failing to pay claims of a certain class, was held to contravene the Fourteenth Amendment, on the ground that it denied to railway companies the equal protection of the law. We ask the attention of the court to the cases in state courts referred to in the opinion of Mr. Justice Brewer (pp. 163-165) "in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right." He said, quoting with approval the language of Black, J., in State vs. Loomis, 115 Mo. 307, 314:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations" (165 U. S. 155, 156).

Again,

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo. vs. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their

development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (pp. 159, 160).

Again,

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection" (p. 165).

In State ex rel. vs. Sheriff of Ramsey County, 48 Minn. 236; 51 N. W. 112, the court held unconstitutional an Act prohibiting the emission of dense smoke within the limits of a city, upon the ground that it excepted "manufacturing establishments using the entire product of combustion, and the heat, power and light produced thereby, where they are generated or within a radius of three hundred feet therefrom." The court said:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is

produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable" (pp. 240, 241).

The objection to the statute at bar is that suggested by Gilfillan, C. J., in Lavallee vs. St. Paul M. & M. Ry. Co., 40 Minn. 249; 41 N. W. 974, that it makes a classification based "*not on the character of the employment, nor of the dangers to which the employes are exposed, but on the character only of the employers.* We can see why the employer's liability should be greater when the business is that of operating a railroad, *but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same.*"

Viewed from the standpoint of the servant, the statute gives to those who are in the employ of corporations rights which it denies to those who are in the employ of individuals, co-partnerships or joint stock companies, although they may be carrying on the same business under similar circumstances.

In Deppe vs. Railroad Co., 36 Iowa, 52, 55, the court puts this illustration:

"Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the railroad employe can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation."

In Johnson vs. St. Paul & D. Ry. Co. 43 Minn. 222, 45 N. W. 156, the court said:

"If a distinction is to be made as to the liability of employers

to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions, unless upon the theory suggested in Railway Co. vs. Mackey, 127 U. S. 205, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,'—a proposition which, as thus broadly stated, that court, in view of its later utterances, could hardly have intended to announce. Indeed, the particular question now under consideration was not before the court, and, presumably, was not in mind. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists."

The statutes involved in the three preceding cases were held to be constitutional: we quote the opinions to show the tests that were applied to accomplish that result. The application of the same tests to the Indiana statute demonstrates its invalidity.

The question urged at bar was not presented in Missouri Pacific Railway Company vs. Humes, 115 U. S. 512; nor in Missouri Pacific Railway Company vs. Mackey, 127 U. S. 205; nor in Chicago, Kansas & Western Railroad Company vs. Pontius, 157 U. S. 209; nor in St. Louis & San Francisco Railway Company vs. Matthews, 165 U. S. 1; nor in Peirce vs. Van Duzen, 47 U. S. App. 339; 78 Fed. 693. The statutes involved in those cases did in fact apply to railway corporations alone, but it was not claimed or suggested in either case that they contravened

the Fourteenth Amendment, because they did not apply equally to railroads owned or operated by persons or co-partnerships. No such question was presented or decided. Nor did either of those statutes undertake to classify *employers* generally, distinguishing corporations from individuals and co-partnerships. They classified *occupations*, distinguishing the operation of railroads from all other *occupations;* whereas the statute of Indiana classifies, not occupations, but employers, making *all* employers *in any* occupation liable, if they happen to be corporations other than municipal, while relieving them from liability, although engaged in the same occupation and under the same circumstances, if they happen to be individuals or co-partnerships.

But the court is asked to strike out the provisions of the Act relating to "other corporations" and to sustain it as an act applying to railroad corporations alone. There are two objections to such a course. In the first place the constitutional objection to the Act is not thereby removed, because it would still discriminate between railroads owned by individuals or copartnerships or joint stock companies (which are not corporations, Chapman vs. Barney, 129 U. S. 677; Gregg vs. Sandford, 28 U. S. App. 313; 65 Fed. 151), and those owned by corporations. If the railway business is to be regulated, the regulation must apply to all persons engaged in the business. It can not discriminate between corporations and other persons operating railroads under the same circumstances. Nor is it material whether this statute would apply to receivers of corporations as held in Peirce vs. Van Duzen, 47 U. S. App. 339; 78 Fed. 693; contra Burke vs. Dillingham, 23 U. S. App. 153; 60 Fed. 729. Under no construction can it apply to individuals or copartnerships, Beeson vs. Busenbark, 44 Kans. 669. The danger of operating railroad trains is the same whether operated by corporations or co-partnerships or individuals. While railroads are usually operated by corporations, there is nothing in the law of Indiana to prevent individuals

or co-partnerships from purchasing and operating railroads. It is in fact quite common for railroads to be purchased at receiver's sales and temporarily operated by individuals.

The other objection to the proposed judicial amendment of the statute is equally serious. It is aptly expressed in the words used by Chief Justice Waite in United States vs. Reese, 92 U. S. 214, 221, and in Baldwin vs. Franks, 120 U. S. 678, 686:

"To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one."

To enforce the statute as one passed in the exercise of the police power for the regulation of railroads (which is what the plaintiff asks the court to do) is not "to give effect to what appears to have been the intent of the legislature;" and that, as suggested by Chief Justice Waite in Allen vs. Louisiana, 103 U. S. 80, 84, is always the test.

The legislature has not undertaken to regulate or classify *occupations*, but to classify *employers*, putting in one class *corporations*, other than municipal, no matter what their business, and in another class all other *persons*, no matter in what business engaged, even if it be that of operating a railroad. The court is not at liberty to reject the classification thus declared by the legislature and to enforce the statute on an entirely different basis. The question before the court is whether the classification proposed by the legislature is valid; not whether their act could be sustained if they had declared some other classification on a wholly different basis.

In Warren vs. Mayor and Aldermen of Charlestown, 2 Gray, 84, Shaw, C. J., said:

"The same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the

legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and that some parts are unconstitutional, all the provisions that are thus dependent, conditional or connected, must fall with them."

The foregoing passage is quoted with approval in Allen vs. Louisiana, 103 U. S. 80, 84, Chief Justice Waite adding:

"The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

In Pollock vs. Farmers' Loan and Trust Company, 158 U. S. 601, 635, 636, the income tax law of 1894 was upset because it constituted "one scheme of taxation," some of whose provisions were illegal. The Chief Justice quotes the test proposed by Mr. Justice Matthews in Poindexter vs. Greenhow, 114 U. S. 270, 304, viz:

"To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact."

But these decisions do not really touch the case at bar. We have not before us two parts of a statute, one lawfully regulating one occupation and another attempting unlawfully to regulate another occupation; but a single statute undertaking to classify employers without reference to their occupations, and the simple question is whether *the classification attempted* can be sustained, or whether it discriminates unlawfully.

## III.

### The Circuit Court did not have Jurisdiction.

The petition alleges that the plaintiff "brings the action *for the benefit* of Mary K. Sweetman, widow, and Clara M. Sweetman and Charles C. Sweetman, children of Chris Sweetman, *who* have been damaged by reason of the death as aforesaid of plaintiff's intestate in the sum of $10,000" (Rec. 2). The petition does not state the citizenship of the parties for whose benefit the action is alleged to be brought, but it affirmatively appears by the bill of exceptions that they are citizens of the same state as the defendant (Rec. 10).

The defendant moved to dismiss the case for want of jurisdiction, but the court overruled the motion holding that it had jurisdiction because the administrator was a citizen of Indiana (Rec. 10).

A claim for wrongful death under the statute of Indiana is not assets of the deceased. Jeffersonville Railroad vs. Swayne, 26 Ind. 477. It belongs to the beneficiaries named in the statute; in this case to the widow and children. The extent to which this is true is shown by the fact that no action lies unless there are beneficiaries. Indianapolis P. & C. R. R. Co. vs. Keeley's Admr., 23 Ind. 133, 136; Jeffersonville Railroad Company vs. Swayne's administrator, 26 Ind. 477, 485; Jefferson M. & I. R. R. vs. Hendricks, 41 Ind. 48, 77; Sorensen vs. Northern Pacific Railroad Company, 45 Fed. 407. The contributory negligence of the beneficiaries defeats the action, Bamberger vs. Citizens St. Ry. Co., 95 Tenn. 18; 31 S. W. Rep. 163, 168, or in the event of the contributory negligence of one of several beneficiaries, his share of the recovery. Wolf, Administrator, vs. Railway Co., 55 Ohio St. 517. In this latter case the court held (syllabus):

"In actions in the name of an administrator under sections 6134 and 6135, Revised Statutes, the administrator is a *mere nominal party*, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named.

2. In arriving at the total amount of damages in such cases, the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding ten thousand dollars.

3. In such actions the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries, will not defeat the action as to others, who were not guilty of such negligence."

The character of the action is further disclosed in the following passages from the opinion of Burket, J.:

"Such defense can not be made as to the negligence of the administrator, because he is a mere nominal party, and has no interest in the damages to be recovered. The contributory negligence of the deceased is not strictly speaking, a defense but a condition which prevents the liability from arising. But the contributory negligence of the beneficiaries, who are to receive the damages, and for whose benefit the action is brought, in the name of the administrator, is clearly a defense to the action available to the person or corporation causing the injury" (pp. 533, 534).

"It therefore seems clear that in arriving at the total amount of damages to be awarded under the statute as amended, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum, which sum should be distributed among the beneficiaries not found guilty of contributory negligence. As to beneficiaries found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which, if any, of the beneficiaries were guilty of such contributory negligence. This would no more complicate the trial than is usual in trials for torts, in which it often occurs that some are discharged, and others held liable."

"Take the case at bar, it may be that on the trial when the case gets back into the Common Pleas it shall appear that the father of the little boy was free from all fault or negligence, and that the mother was guilty of negligence which contributed directly to the death. In such case the jury should assess the damages, if any, which the father has sustained, and return a verdict for that

amount only, and award no damages whatever for the benefit of the negligent mother" (pp. 535, 536).

"It is therefore clear that the statute throughout is distributive in its character, and that the damage should be assessed only for the benefit of those who are not guilty of contributory negligence, and that when recovered the damages should be distributed by the probate court only among such as the verdict of the jury shall show to be entitled thereto. This throws no clog in the way of the prosecution of the action by the administrator, and awards damages to those who are without fault, and does not reward those who contributed to the injury" (p. 537).

In City of Friend vs. Burleigh (Nebraska), 74 N. W. 50, the court said:

"This cause of action did not belong, and does not belong to the estate of the decedent. It belongs to his widow and next of kin, and was not, and is not, and can never become, an asset of his estate."

In every real and substantial sense, the claim sued on is a claim of Mary K. Sweetman, Clara M. Sweetman and Charles C. Sweetman, citizens of Ohio, against the Cincinnati, Hamilton & Dayton Railroad Company, also a citizen of Ohio. It is true that the statute of Indiana authorizes an action in the name of the administrator, but he does not recover as administrator. The damages "inure to the exclusive benefit of the widow and children" (Sec. 285). The provision for bringing the action in the name of the administrator is a section of the Code of Procedure of Indiana, which controls the courts of that state, but in this court no reason is apparent why the action might not be maintained in the name of the real parties in interest, for whose use and benefit indeed the present suit is brought, according to the express allegations of the petition. But assuming that the action must be brought in this court in the name of the administrator, in conformity with the decision in Weidner vs. Rankin, 26 Ohio St. 522, it is still true that the "controversy" in the sense of the Constitution is between citizens of the same state. In Wolf, Administrator, vs. Railway Company, 55 Ohio St. 517, 530, the court while saying that the

action must be brought in the name of the personal representative as a nominal party points out that "the statute does not even say that he shall bring the action, but says that it shall be brought in his name for the exclusive benefit of the beneficiaries."

If the plaintiff's device succeeds every action for wrongful death, may, at the election of the claimants, be brought in the Federal courts.

Where an administrator sues to recover property vested in him as such, his citizenship is doubtless the test of jurisdiction in the Federal courts, and the same is true of a suit brought by a trustee of a mortgage suing upon a contract made with him. But that is not this case. This is an action in tort, brought by a nominal formal party, for the use and benefit of other parties, to recover damages which have accrued to them.

State of Indiana vs. Glover, 155 U. S. 513, was an action brought in the name of the State of Indiana on the relation of Stanton, a citizen of New York, against Glover and other citizens of Indiana on an official bond given by Glover. The court held that the Circuit Court had jurisdiction because Stanton was the real party in interest, although the action was brought in the name of the state. Stanton was himself a trustee. The Chief Justice takes pains to say that "Stanton *and his cestuis qui trust* were citizens of other states than Indiana" (155 U. S. 517).

In Maryland vs. Baldwin, 112 U. S. 490, it was held that "a suit on an administrator's bond, taken in the name of a state for the benefit of parties interested, is for the purpose of jurisdiction, to be regarded as a suit in the name of the party for whose benefit it is brought." Mr. Justice Field said:

"The name of the state is used from necessity when a suit on a bond is prosecuted for the benefit of the person thus interested, and in such cases the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the Circuit Court of the United States has jurisdiction" (112 U. S. 491).

McNutt vs. Bland, 2 How. 9, was a similar case. Mr. Justice

Baldwin, referring to the provision of the constitution which extends the judicial power of the United States to controversies between citizens of different states and to the judiciary act, said:

"Both look to things, not names, to the actors in controversies and suit, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law" (2 How. 14).

In Maryland, actions for wrongful death must be brought in the name of the state "for the use of the persons entitled to damages." Rev. Code 1878, p. 724. Is the state in such an action any more or less a nominal and formal party than the administrator at bar?

Stewart vs. Baltimore & Ohio Railroad Company, 168 U. S. 445, was an action brought in the Supreme Court of the District of Columbia for the benefit of the widow to recover damages caused by the death of the husband and intestate in a collision in the state of Maryland. The Supreme Court, reversing the judgment of the Court of Appeals of the District of Columbia, held "that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland." Mr. Justice Brewer said:

"The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

*For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party.* Browne vs. Strode, 5 Cranch, 303; M'Nutt vs. Bland, 2 How. 9; State of Maryland, for use of Markley, vs. Baldwin, 112 U. S. 490.

See, also, Gaither vs. Farmers' & Mechanics' Bank of Georgetown, 1 Pet. 37, 42, in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcoran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form, *the cestui que use is regarded as the real party to the suit.*' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that *the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought;* and the courts of either jurisdiction will see that the damages awarded pass to such party."

It will be noticed that the action was not brought under the Act of Congress, which provided for recovery only "in case the act causing death is done within the limits of the District of Columbia," but to enforce a cause of action created by the statute of Maryland. And the point decided was that, although the statute creating the right directed that "every action" to enforce it "should be brought by and in the name of the State of Maryland," an action might nevertheless be maintained in the federal courts in the name of an individual (in that case an administrator) for the use of the person intended to be benefited by the statute, the latter, for "purposes of jurisdiction in the federal courts" and not the nominal plaintiff, being regarded as the real party in interest.

Huff vs. Hutchinson, 14 How. 586, was an action on an attachment bond brought in the name of a former marshal of the United States, who was a citizen of the same state with the defendants, for the use and benefit of persons who were citizens of a different state from the defendants. The court sustained the jurisdiction, Mr. Justice McLean saying:

"The real plaintiffs were those named in the declaration for whose use the suit was brought, and who are averred to be citizens of New York" (14 How. 587).

In Blacklock vs. Small, 127 U. S. 96, the court sustained two objections to the jurisdiction. The first objection was upon the

ground that the action was by assignees of a chose in action, whose assignor could not have sued in the federal court. The second objection was upon the ground that although the plaintiffs were citizens of different states from the person who was sought to be held liable upon the bond, the recovery must necessarily inure to the benefit of another person who was equally interested with the plaintiffs in the recovery, but who was a citizen of the same state with the obligor. Mr. Justice Blatchford said:

"The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that, at the time of the commencement of the suit, she was and has since then always continued to be, a citizen of South Carolina, of which state Small was and is a citizen. The Circuit Court ought, therefore, to have dismissed the bill for want of jurisdiction" (127 U. S. 104, 105).

It has been uniformly held that the citizenship of a next friend is not the test of jurisdiction in the federal courts. Blumenthal vs. Craig, 55 U. S. App. 8; 81 Fed. 320; Woolridge vs. McKenna, 8 Fed. 650, 668; Voss vs. Neineber, 68 Fed. 947; Williams vs. Ritchey, 3 Dil. 406 (Fed. cas. No. 17734).

## IV.

### The Administrator's Appointment is Void.

The petition alleges that the plaintiff "was *duly* appointed and qualified by the Circuit Court of Fayette county, Indiana, as the administrator of the estate of Chris. Sweetman, deceased" (Rec. 1, 2). This allegation is denied by the answer (Rec. 4). The court held that the plaintiff's appointment could not be attacked collaterally, and excluded evidence tending to show that the appointment was void (Rec. 11).

The jurisdiction of the Circuit Court of Indiana to appoint an administrator is strictly statutory. Jefferson Railroad vs. Swayne, 26 Indiana, 477, 483; Croxton vs. Renner, 103 Indiana, 223.

The statute is as follows (Burns' Revision of 1894, Sec. 2381):

"Such letters shall be granted in the county—

First. Where, at his death, the intestate was an inhabitant.

Second. Where, not being an inhabitant of this state, he leaves assets.

Third. Where, not being an inhabitant and dying out of the state, he leaves assets.

Fourth. Where, not being an inhabitant, he dies out of the state, not leaving assets in any county thereof, but assets of such intestate shall afterward come into it.

Fifth. But where, not being an inhabitant, he shall die out of the state, leaving assets in several counties, or assets of such intestate shall, after his death, come into several counties, letters may be granted in any one of the counties in which such assets may be at the time of his death, or into which they come thereafter; and the administration first lawfully granted shall extend to all the estate of the intestate, and exclude the jurisdiction of administration in the same estate in all other counties."

It is admitted "that the deceased at the time of his death was, and prior thereto had been, a resident and citizen of the state of Ohio" (Rec. 10). The only jurisdiction therefore to appoint an administrator in Indiana was upon the ground that Sweetman, "not being an inhabitant of Indiana" had "left assets" in Fayette

county. This is not the ground upon which administration was granted. The letters themselves describe Sweetman as "late of Fayette county," and show that the appointment was made on that ground (Rec. 12). The application does not state that Sweetman left assets *in Fayette county*, nor that he was *not* an inhabitant of Indiana (Rec. 14).

In Jefferson Railroad vs. Swayne, 26 Indiana, 477, it was held that a claim for wrongful death is not assets within the meaning of this statute, and that an appointment based thereon is null and void. Elliott, J., after quoting the statute said:

"The jurisdiction of the court over the subject is derived from these provisions of the statute, and can only be exercised under the circumstances and in the cases provided for thereby; and where the intestate is not an inhabitant of this state at the time of his death, and leaves no assets in the state, and none came into it afterward, no jurisdiction is conferred on the court, in any county of the state, to grant letters of administration on the estate of such intestate, *and the grant of letters under such circumstances is coram non judice and void*, see authorities supra, and also Longworthy vs. Baker, 23 Ill. 484; McChord vs. Fisher's Heirs, 13 Ben Mon. 193; Flinn vs. Chase, 4 Denio, 85.

This presents for our determination the question, is the claim for damages against the railroad company for causing the death of Swayne, assets of his or of his estate within the meaning of the statute? The term "assets," as used in the third and fourth clauses of the section of the statute last cited, evidently means assets of the intestate, that is, property rights, or choses in action held by, or belonging to, the intestate at the time of his death, and which, as a part of his estate, his admistrators, as his legal representative, is entitled to in the due administration of the estate, for the payment of debts. See Bouvier's Law Dic., title, "assets;" Toller on Exrs., 137; William on Exrs., 1496.

The right of action referred to against the appellant, for causing the death of Swayne, did not exist at common law, but it is based upon section 784, of the Code, which provides that, "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury

for the same act or omission. The action must be commenced within two years. The damages can not exceed $5,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." That a cause of action for an injury to the person dies with the party injured, and does not survive to his personal representative, is a maxim of the common law, too familiar and long established to require the citation of authority to support it. The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it *creates a new cause of action*, unknown to the common law.

The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which died with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and if no such person existed, it could not be maintained. The Indianapolis, etc., R. R. Co. vs. Keeley's Adm'r, 23 Ind. 133; Lucas vs. The New York, etc., R. R. Co., 21 Barb. 245; The Chicago, etc., R. R. Co., vs. Morris, 26 Ill., 400; The State vs. Gilmore; 4 Foster, 461; Lyons' Admr., vs. Cleveland, etc., R. R. Co., 7 Ohio St., 336; The Commonwealth vs. The Eastern R. R. Co., 5 Gray, 473;

In Whitford vs. The Panama R. R. Co., 23 N. Y. 465, it was held, under a statute substantially the same as ours, that the compensation for the bodily injury remains extinct, but a new grievance, of a distinct nature, namely, "the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action in favor of these surviving relatives, but to be prosecuted, in point of form, by

the executor or administrator." It was also held that the reference in the statute of that state, of which ours, in that particular, is a copy, "to the ability of the deceased to maintain the action if death had not ensued, is inserted solely for the purpose of defining the kind and degree of delinquency with which the defendant must be chargeable, in order to subject him to the action. The act, neglect or default must be such as would, if death had not ensued, have entitled the party injured to maintain an action," see also Woodward vs. Michigan, etc., R. R. Co., 10 Ohio St., 121.

The amount of damages to be recovered in such a suit is limited, both by the statutes of New York and of this state, to $5,000, but there is a difference in the language of the two statutes in this respect. The New York statute declares "the sum recovered to be for the exclusive benefit of the widow and next of kin," and that, "the jury may give such damages as they shall deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person," while the statute of this state, as we have seen, provides that "the damages can not exceed $5,000, and must inure to the exclusive benefit of the widow and children, or next of kin." This however is but a difference in form and not in substance. Our statute creates a new cause of action for the exclusive benefit of the widow, and children, or next of kin, not for the injury to the deceased, for which, had he lived, he might have sustained an action, but for causing his death, and thereby depriving those entitled thereto of his society and support, and it follows, as a legal consequence, that the damages assessed must be based on the injuries resulting from such death to the wife and children, or next of kin, for whose benefit the right of action is given."

In Perry, Administrator, vs. The St. Joseph & Western Railroad Co., 29 Kan. 420, which was an action for wrongful death, it was held that the claim sued for was not assets upon which administration could be founded, and that the invalidity of administration based solely thereon was a defense to the action. Horton, C. J., said:

"If the deceased was not an inhabitant or resident of this state at the time of her death, and if she left no estate to be ad-

ministered within this state, and none came into it afterward, then the Probate Court of Doniphan county had no jurisdiction to issue letters of administration on the estate of the deceased, or to appoint the plaintiff her administrator, *and all its acts in doing so are void in toto.* It has been decided in many cases that administration granted on the estate of a person not really dead is totally void (Stephenson vs. Superior Court, 15 Reporter, p. 140; Griffith vs. Frazier, 8 Cranch, 23; Williams on Exec. [Am.. notes by Perkins], 632 and notes to p. 631). The jurisdiction of the Probate Court of Doniphan county to issue letters of administration is derived from the provisions of the statute, and can be only exercised under the circumstances and in the cases provided for thereby, therefore if the deceased, not being an inhabitant or resident of this state at the time of her death, left no estate to be administered within this state, and none comes into it afterward, that court under the statute has no jurisdiction to grant administration. But it is said that the Probate Court had jurisdiction to ascertain whether, as a fact, the deceased left any estate in Kansas, and its judgment granting letters of administration is conclusive until revoked or reversed. Where the jurisdiction of a court is conceded, as a rule its judgment is conclusive of all matters involved; but if the jurisdiction be disproved then the judgment is void for all purposes (Mastin vs. Gray, 19 Kas. 458, and the cases there cited; Melia vs. Simmons, 45 Wis. 334; Moore vs. Smith, 11 Rich [S. C.] Law. 569).

Now the Probate Court of Doniphan county had no authority to grant letters of administration unless the deceased left an estate in that county, and it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use a common expression, "reasoning within a circle." The Probate Court of that county we suppose assumed that the deceased had left an estate to be administered and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective than if the Probate Court of Doniphan county had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the Probate Court rests upon the fact of an estate belonging to the deceased in Kansas, if the defendant can

clearly show that the deceased died without leaving any estate of any kind, it must result that *the entire proceedings before the Probate Court were without jurisdiction, and void* (D'Arusmart vs. Jones, 11 Cent. L. J. 253; Thompson vs. Whitman, 18 Wall. 457; Jochemsen vs. Bank, 3 Allen, 87.)"

To the same effect is Paul vs. Willis, 69 Tex. 261, 266; 7 S. W. 357, 359, where it was held that a bona fide purchaser at a sale under the void administration is not protected.

In Thumb vs. Gresham, 2 Metc. (Ky.) 306, the court held:

"A county court in this state has no jurisdiction to grant administration on the estate of a person who died domiciled in another state, where there is no personal estate here to be administered; and every such grant is void, and confers no power or authority on the person appointed as administrator."

In Holyoke vs. Haskins, 5 Pick. 20; s. c. 9 Pick. 259, it was held that letters of administration granted by the judge of probate of Suffolk county, on the estate of a resident of the county of Middlesex, were absolutely null and void, even after twenty years, and as against a purchaser in good faith of real estate sold by the administrator on license.

In Griffith vs. Frazier, 8 Cranch, 9, 24, the opinion being delivered by Chief Justice Marshall, it was held that the appointment of an administrator during the temporary absence from the state of the executor theretofore appointed, was null and void, and subject to collateral attack.

In Scott vs. McNeal, 154 U. S. 34, it was held that the appointment of an administrator of a person not in fact dead was absolutely null and void, and subject to collateral attack.

The watch, chain, rings and other personal effects on Sweetman's person at the time of his accidental killing in Indiana, he being at the time a resident and citizen of Ohio, temporarily in Indiana, are not "assets" "left" by him in Fayette county, within the meaning of the statute. These trinkets may have been carried back from Ohio to Fayette county, Indiana, at the time of the application for administration, in which event they would

clearly not be assets on which an administration in Indiana could be founded, but inquiry on this point was cut off by the Circuit Court on the ground that the record was conclusive and could not be attacked (Rec. 11). The ruling out of this testimony is perhaps immaterial, because it appears from the letters themselves that administration was granted, upon the supposition that Sweetman had died an inhabitant of Indiana; and since it is admitted that no such ground for the assumption of jurisdiction by the Fayette Circuit Court in fact existed, the plaintiff's appointment is absolutely null and void.

## V.

### The Plaintiff having been Appointed Administrator in Indiana alone, can not maintain this action in Ohio.

The defect appears upon the face of the petition. In Duchesse D'Auxy vs. Porter, 41 Fed. 68, it was held that

"A complaint by an administratrix, showing her appointment in another state, but averring none in the state in which the federal court in which suit is brought is sitting, is demurrable."

To the same effect is Noonan vs. Bradley, 9 Wall. 394, 403, where Field, J., said:

"But, in the case at bar, had there been no other plea than the third plea, which goes to the merits, the character of the plaintiff, as administrator in Wisconsin, would not have been admitted, for the reason that the declaration states that the grant of administration to him was by letters issued in the state of New York, and the plea to the merits only admits the title as stated in the declaration. The effect of a plea to the merits was decided as long ago as the time of Lord Holt, in the case of Adams vs. The Tertennants of Savage (6 Modern, 134). In that case the plaintiff brought a *scire facias* against the defendants, reciting a judgment recovered by his intestate against Savage, and that administration was committed to him by the Archdeacon of Dorset, whose jurisdiction did not extend to the place where the judgment was rendered. The tertennants traversed the seisin of Savage, and the finding being against them, motion in arrest of judg-

ment was made, on the ground that the administration committed to the plaintiff was void. It was urged for the judgment, that though the plaintiff had shown a bad title, the defendants not traversing it, or taking advantage of the invalidity of the administration, but pleading to the merits, admitted that the plaintiff was entitled to sue, and should not be permitted, when the right was tried against them, to controvert what they had declined to insist upon; but Chief Justice Holt said: 'If the plaintiff had not set forth what kind of administration he claimed by, but only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put you upon showing it by craving oyer of the letters of administration as he might have done, but pleaded over; that had been an admission of the plaintiff's having a right of suing as administrator as he had alleged.' And after stating that the plaintiff made title to himself by an administration which was invalid, the Chief Justice continued: 'And when you yourself affirm this to be your title, how can we intend you to have another; for of your own showing this is your title, which is manifestly bad? And there is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that, for then it may be well presumed if the party were not well satisfied of plaintiff's title he would have insisted on it in due time, and where the plaintiff himself shows he has no title, for then the court has no room for intendment.' The authority of this case has not, so far as we are aware, ever been doubted, and were there no other ground against the position of the plaintiff, it would be decisive."

See also Insurance Co. vs. Lewis, 97 U. S. 682, 686.

In Johnson vs. Powers, 139 U. S. 156, which was a bill in equity filed in the Circuit Court of the United States for the Northern District of New York by an administrator appointed in Michigan, Mr. Justice Gray said:

"The plaintiff certainly can not maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that state, and can not authorize him to maintain any suit in the courts, either state or national, held in any other state.

Stacy vs. Thrasher, 6 How. 44, 58; Noonan vs. Bradley, 9 Wall. 394."

In New England Mutual Life Insurance Co. vs. Woodworth, Admr., 111 U. S. 138, 146, Mr. Justice Blatchford said:

"Administration in Massachusetts or in Michigan would not suffice as a basis for a suit in Illinois."

Story (Conflict of Laws, Sec. 513) thus states the rule almost in the language used by him in Vaughan vs. Northup, 15 Pet. 1, 6:

"It has * * * become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator (or other foreign personal representative) in his official capacity, in the courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him."

The difficulty is not removed by Rev. Stat. Ohio, Secs. 6133, 6134a, 6135.

Section 6133 passed March 23, 1840 (38 Ohio Laws, 147, 187), is a section of "An act to provide for the settlement of the estates of deceased persons." It applies, according to its express terms, only to suits brought by a foreign executor or administrator "in his capacity of executor or administrator;" that is, to recover assets which have descended to him as administrator. It does not relate to suits brought by an administrator as a nominal party for the use and benefit of others, to enforce a cause of action which does not belong to the estate, and which does not vest in the administrator in "his capacity of administrator."

Section 6134a provides that a right of action for wrongful death given by a statute of a foreign state may be enforced in this state under certain circumstances. It was passed as an amendment of the Ohio Statute, in view of the decisions in Woodard vs. Michigan Southern, etc., Railway Company, 10 Ohio St. 121, and in Hover, Administrator, vs. Pennsylvania Company, 25 Ohio St. 667, to the effect that the Ohio Statute did "not extend to cases where the wrongful act which caused the

death was committed outside the state of Ohio." But Sec. 6134a does not provide that the action shall be brought by a *foreign* administrator, and clearly does not contemplate an action in that form in cases where, as at bar, the deceased was, and his widow and children are residents of Ohio.

The action at bar might have been maintained in the Circuit Court of the United States for the district of Ohio, without the aid of Sec. 6134a. Dennick vs. Railroad Company, 103 U.S. 11; Texas & Pacific Railway Company vs. Cox, 145 U. S. 593, 605. That section added nothing to the jurisdiction of the court below. But in Dennick vs. Railroad Company, 103 U. S. 11, which was an action brought in the Circuit Court of the United States for the Northern district of New York for a wrongful death in New Jersey, the plaintiff was an administrator appointed in New York. Mr. Justice Miller said:

"Let it be remembered that this is not a case of an administrator, appointed in one state, suing in that character in the courts of another state, without any authority from the latter. It is the general rule that this can not be done. The suit here was brought by the administratrix in a court of the state which had appointed her, and of course no such objection could be made" (103 U. S. 19).

In Bruce's Admr. vs. Cincinnati Railroad Co., 83 Ky., 174, 181, it was held that an administrator appointed in Kentucky might maintain an action in the courts of that state for a wrongful death occurring in Tennessee, the court saying that a personal representative appointed in Tennessee "could not in virtue of such appointment alone, maintain the action here."

The point that sections 6133, 6134a, 6135, Rev. Stat. Ohio, do not entitle the plaintiff, as *foreign* administrator, to maintain this action in Ohio seems to be covered by the decision of this court in Maysvillle Street Railroad & Transfer Company vs. Marvin, 16 U. S. App. 236; 59 Fed. 91, where it was held (1) that a statute of Kentucky, which is part of the General Administration Act of that state, and the substantial equivalent of sec. 6133 Rev. Stat. Ohio, does not confer upon a foreign administrator

capacity to sue in Kentucky *for wrongful death*, and (2) that another statute of Kentucky giving the "personal representative" a right of action for wrongful death, and which is otherwise the substantial equivalent of sec. 6135 Rev. Stat. Ohio, was not to be construed as conferring such right upon a *foreign* administrator.

Section 6134a is made a part of the statute of which section 6135, providing that "*every such action* * * * shall be brought in the name of the personal representative of the deceased," is the following section. The direction of sec. 6135 as to the name in which the action shall be brought is general, applying to all actions, whether for death occurring in the state or out of the state. That section can not therefore be construed as conferring any special rights upon *foreign* administrators, as such. Whether they may sue in the courts of Ohio is left to be determined by general rules of law, and those rules, as this court has decided and as the Supreme Court has repeatedly held, forbid such an action.

It was not necessary to procure the appointment of an administrator in Indiana for the purposes of suit either in that state or in Ohio. The Supreme Court of Indiana has held that the action may be maintained in the courts of that state by a foreign administrator. Railroad Co. vs. Hendricks, 41 Ind. 48; Memphis & C. Packet Co. vs. Pikey, 142 Ind. 304. Indeed an action is now pending in the Circuit Court of Fayette county, Indiana, against the plaintiff in error for this very cause of action, brought by Mary K. Sweetman, as administrator, appointed by the Probate Court of Montgomery county, Ohio.

We respectfully submit that the judgment of the Circuit Court should be reversed.

LAWRENCE MAXWELL, JR.,
Counsel for the Plaintiff in Error.

WM. K. MAXWELL,
WM. W. RAMSEY,
Of Counsel.

## STATUTE OF INDIANA.

AN ACT regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state. *Provided further*, That its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Laws of Indiana, 1893, p. 294, Revised Statutes of Indiana, 1894 (Burns) sections 7083-7087.) [Approved March 4, 1893.]

[7083] 1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place,

and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

[7084] 2. Neither an employe nor his legal representative shall be entitled under this act, to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employe to palpable danger, nor where the injury was caused by the incompetency of the co-employe, and such incompetency was known to the employe injured; or such injured employe, in the exercise of reasonable care might have discovered such incompetency; unless the employe so injured gave or caused to be given information thereof to the corporation or to some superior entrusted with the general superintendence of such co-employe, and such corporation failed or refused to discharge such incompetent employe within a reasonable time, or failed or refused within a reasonable time, to investigate the alleged incompetency of the co-employe or superior, and discharge him if found incompetent.

[7085] 3. The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: Provided, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

[7086] 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

[7087] 5. All contracts made by railroads or other corporations

with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act however shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

**English Employers' Liability Act of 1880, 43 and 44 Vict. Ch. 42.**

An act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service. (7th September, 1880).

Be it enacted by, etc., etc., as follows:

1. Where, after the commencement of this act, personal injury is caused to a workman—

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the négligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine or train upon a railway, . . . . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled, under this act, to any

right of compensation or remedy against the employer in any of the following cases; that is to say

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of an Act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer of such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

(Limitation of time for bringing suit, etc.)